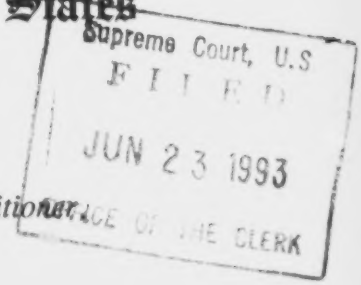
92-2042

No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992



CAROL ROBINSON,

Petitioner,

v.

CENTRAL BRASS MANUFACTURING and INTERNATIONAL UNION OF AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS, LOCAL 1196,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 23, 1993

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QUESTION PRESENTED

Is the statute of limitations for a hybrid action, to enforce a collective bargaining agreement against an employer and the duty of fair representation against a union, tolled by the good faith pursuit of an internal union appeal of the actions that are alleged to have breached the union's duty of fair representation, which is normally a prerequisite to a hybrid action?

PARTIES BELOW

All parties in the court below are identified in the caption. The International Union, UAW, joined in the brief of its local union and described itself as a defendant-appellee, although the complaint was brought only against the local.

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In The

Supreme Court of the United States

October Term, 1992

No. 92-

CAROL ROBINSON,

Petitioner,

v.

CENTRAL BRASS MANUFACTURING and INTERNATIONAL UNION OF AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS, LOCAL 1196,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Carol Robinson petitions the Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this matter.

OPINIONS BELOW

The opinion of the court of appeals is reported at 987 F.2d 1235, and is set forth in the Appendix to the Petition at 1a to 20a ("App. 1a-20a"). The unreported opinions of the district court, granting summary judgment to respondent Central Brass and to respondent Local 1196, are set forth at App. 21a-26a and 27a-29a, respectively.

JURISDICTION

The court of appeals issued its opinion and judgment on February 24, 1993. On May 6, 1993, Justice Stevens

granted an extension of time to file the petition until June 24, 1993. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), provides in pertinent part as follows:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes . . ..

STATEMENT

A. Facts.

Petitioner Carol Robinson was employed as a machine operator at a factory operated by respondent Central Brass Manufacturing Company ("Central Brass"). Central Brass' employees were represented in collective bargaining by respondent Local 1196, International Union, United Automobile, Aerospace and Agricultural Implement Workers ("Local 1196"). At all relevant times, the terms and conditions of petitioner's employment were governed by a collective bargaining agreement ("CBA") effective from April 1987 to April 1990.

In February, 1989, Central Brass instituted a new employee attendance program, under which employees with excessive absenteeism are counseled to improve their attendance at work, culminating in a "decision day," when an employee is given a day off from work to reflect on whether she desires to continue her employment with the company. On August 23, 1989, petitioner was given a decision day, and although her attendance record improved substantially afterward, she was discharged on October 24, 1989, on the ground that her attendance remained unsatisfactory. Petitioner, who is an African-American, believed that her attendance had shown substantial improvement, and that her record was at least as good as other, white employees who had not been discharged.

Accordingly, she filed a grievance alleging that the discharge violated the CBA.

The CBA provides for a multi-step grievance procedure, which allows employees to file grievances on their own. If management does not accede to the grievance, it is considered by representatives of union and management at higher and higher levels of their respective hierarchies, until, if the matter cannot be resolved, either party has the option of referring the matter to arbitration. At each step of the procedure, the union has the option of accepting management's disposition as final, and thus withdrawing the grievance; if the grievance is not processed by the union within certain time limits, it cannot be further processed. CBA, Section 13g. The CBA also provides for the possibility that, after a grievance is withdrawn, it may be reinstated, if the parties agree that the grievance was improperly withdrawn, or if "any agency or court decides that [the] grievance was improperly withdrawn." *Id.*, Section 14a.

By letter dated November 9, 1989, the Chairman of Local 1196's bargaining committee informed petitioner that the committee had decided not to pursue her grievance. The letter reminded petitioner that, if she was dissatisfied with this decision, she could appeal within the union, and attached copies of the local bylaws and Constitution of the International UAW ("UAW"), which require an employee to appeal first to the local union at the next union membership meeting, thence to the UAW's International Executive Board ("IEB"), and finally to the independent Public Review Board ("PRB"). Both the bylaws and the Constitution expressly forbid any member from suing until the intra-union appeals have been exhausted, on pain of union discipline.

Petitioner claimed that, in making its decision to withdraw her grievance, respondent Local 1196 failed to discuss it with her at all, and, as a result, overlooked significant facts in her favor. Moreover, she asserted, union

representatives gave shifting explanations for the decision to drop her grievance. Accordingly, she filed a timely appeal to the local union's membership, as she had been directed to do if she was dissatisfied with the union's decision. After the membership voted to uphold the grievance committee's decision, she appealed to the IEB. By letter of August 30, 1990, the International President told petitioner that the IEB had rejected her appeal.

B. Proceedings Below.

On November 1, 1990, petitioner filed this action in the United States District Court for the Northern District of Ohio, Eastern Division. The lawsuit was a "hybrid" action, alleging that respondent Central Brass had violated the CBA, and that respondent Local 1196 had breached its duty of fair representation ("DFR"). Jurisdiction was based on 29 U.S.C. § 301 and 28 U.S.C. §§ 1331 and 1337. Respondents answered the complaint, raising a variety of defenses, including the defense, raised by Local 1196, that the complaint should be dismissed for failure to exhaust intra-union remedies, because petitioner had not pursued an appeal to the PRB which, Local 1196 alleged, could have provided petitioner with complete relief. Answer, ¶ 41.

Central Brass then moved for summary judgment, alleging that petitioner's claim under the CBA was barred by the six-month statute of limitations that this Court has held applies to hybrid actions. *DelCostello v. Teamsters*, 462 U.S. 151 (1983). Petitioner agreed that more than six months had passed, but argued that, because employees are generally required to exhaust intra-union remedies before bringing a hybrid action, the six-month period should be tolled for the period when she was pursuing her intra-union remedies.

On April 11, 1991, the district court granted the motion for summary judgment. App. 21a-26a. It decided first, as a matter of law, that the intra-union appeal could not have resulted in either the reinstatement of her grievance or

the restoration of her employment. *Id.* 23a, 24a. Therefore, even though petitioner's union had instructed her that exhaustion was required, exhaustion was not, in fact, legally necessary. *Id.* 24a. Thus, according to the district court, it was only by petitioner's choice that intra-union remedies were exhausted, and hence the running of the statute of limitations could not be tolled simply because she exercised this option. *Id.*

Local 1196 then moved for summary judgment, arguing that the district court's reasoning applied equally to it; petitioner also moved for reconsideration of the summary judgment granted in favor of Central Brass. Both respondents averred that the reference to reinstatement after an "agency" decides that the grievance was improperly withdrawn did "not refer to any union board of review or union agency," but had been construed to include only government agencies.[1]

The district court accepted the parties' construction of the CBA as not extending to intra-union appeals, and thus agreed that exhaustion was optional, not mandatory. *Id.* 29a. Accordingly, the court denied the motion for reconsideration of its earlier ruling in favor of Central Brass, and extended its rejection of tolling to the DFR claims against Local 1196. *Id.*

Petitioner then appealed to the Court of Appeals for the Sixth Circuit, which affirmed summary judgment in favor of Central Brass, but reversed the judgment for Local 1196. The court agreed that, at least in some circumstances, an employee's efforts to exhaust intra-union remedies could toll the statute, following *Clayton v. UAW*, 451 U.S. 679 (1981), where this Court had ruled that district courts have discretion

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[1] The parties deleted the reference to reinstatement of grievances in the new CBA they negotiated in 1990, although they acknowledged that petitioner's grievance had been considered under the procedures set forth in the 1987 CBA.

to require exhaustion of intra-union appeals, and that, where any one of three factors is present, a court "may properly excuse the employee's failure to exhaust." *Id.* at 689. In this regard, the court took note of the Seventh Circuit's decision in *Frandsen v. BRAC*, 782 F.2d 674 (1986), where the court held that intra-union appeals always toll the statute of limitations, even if the remedies subsequently are determined to have been futile or otherwise legally not required. App. 7a-13a.

However, the court rejected *Frandsen*'s clear rule, deciding instead that the tolling effect of an intra-union appeal must be measured after the fact, according to whether the intra-union appeal could actually have provided relief against each defendant. *Id.* 13a. If no such remedies were possible, then the intra-union appeals were futile, and it would be unfair to the defendant to toll the statute pending exhaustion. *Id.* 14a. The court acknowledged that it might be hard for employees to predict in advance whether the union remedies were futile, and suggested that a court should take this factor into account in ruling on tolling. *Id.* It further asserted that decisions about tolling are within a district court's discretion, that there would be no "bright line rules," and that "[e]ach case must be analyzed on its own facts in light of the three factors stressed in *Clayton* and the four-part test outlined in *Frandsen*." *Id.*

Applying this analysis, the court below held that the statute was not tolled against Central Brass, because the court of appeals believed that the CBA clearly prevented intra-union appeals from leading to the reinstatement of the grievance. *Id.* For this reason, the court thought that it should have been clear to petitioner that, once the union chose not to seek arbitration, her private remedies against Central Brass were completed and the statute began to run. *Id.* 14a-15a. "[T]he federal interest in the private settlement of labor disputes would not be served by tolling the limitations period while Robinson tried to obtain a private settlement with the union." *Id.* 15a. The court acknow-

ledged that petitioner had, in fact, believed that the union remedies could have led to reinstatement, but concluded that this good faith error could not preserve her claim against Central Brass:

> Therefore, we hold that Robinson exhausted all internal remedies for her claim against Central Brass when the union failed to request arbitration and thus her § 301 claim against Central Brass is barred by the six-month statute of limitations period.
>
> *Id.*

The court did, however, give the appeals a tolling effect for the DFR claim against respondent Local 1196. Id. 15a-18a. Even if the intra-union appeal could not have produced relief against Central Brass, it could have produced relief against Local 1196, in the form of monetary damages. *Id.* 16a. Moreover, the court was unwilling to allow Local 1196 to derive benefit from its own misleading statements to petitioner, inasmuch as it both instructed her that she was required to exhaust before suing, *id.* 18a, and failed to correct the assertion in her appeal that, if the appeal succeeded, the remedy would be to arbitrate her grievance. *Id.* 18a-19a.[2]

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the holdings of several other lower courts regarding the tolling effect of exhausting intra-union remedies and with this Court's insistence that claims against employers and unions should be

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[2] Finally, the court raised the possibility that the grievance might yet be reinstated, because the district court might find, on remand, that the grievance was improperly withdrawn, thus providing the basis for reinstatement under section 14a of the CBA. App. 20a. The court did not explain why, in that event, the intra-union remedies were not, in fact, needed to keep her grievance alive against the company, thus undercutting the court's own analysis leading to the dismissal of Central Brass.

subject to the same procedural rules. Moreover, by eliminating the certainty created by prior decisions that employees who exhaust their intra-union remedies, which almost always take longer than the six-month limitations period, do not risk having their claims barred as untimely, the ruling threatens to substantially increase the number of hybrid actions filed, by discouraging employees from exhausting their intra-union remedies before they sue. In order to understand why this issue warrants review in this Court at this time, it is important first to review this Court's rulings concerning exhaustion and limitations for hybrid actions, and then consider the way that other courts have addressed this question, as well as the "practicalities of litigation" in labor cases, *DelCostello v. Teamsters*, 462 U.S. 151, 172 (1983), that make the ruling below so dangerous.

1. In *Clayton v. UAW*, 451 U.S. 679 (1981), this Court held that the federal policy favoring resolution of labor disputes through private rather than judicial means supported a general, but not universal, requirement that employees exhaust intra-union appeals before a hybrid action may be pursued. Under *Clayton*, exhaustion may be excused where any one of three exceptions is found -- hostility of the union officials to whom the appeal would be taken, inability of the intra-union appeal to provide complete relief (including reinstatement of the grievance and thus possible reinstatement to employment), and unreasonable delay in obtaining a judicial hearing on the merits. The Court rejected the argument that there should be separate exhaustion requirements for the employer and the union because, if the action were allowed to proceed against the employer while the statute was tolled against the union, the result would be, in effect, "two separate § 301 suits, based on the same facts, proceeding at different paces in its courtroom. [T]his is a result that should be avoided if possible." 451 U.S. at 695.

During the same Term, in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), and then again two years later in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), the Court addressed the limitations periods that apply in hybrid actions. The Court ultimately held that the statute of limitations for bringing both claims that comprise a hybrid action -- the claim against the employer under section 301, and the DFR claim against the union -- should be governed by the six-month limitations period prescribed for unfair labor practice charges by section 10(b) of the National Labor Relations Act. The Court again rejected the argument that the two claims should be subjected to different limitations periods. *Id.* at 168-169 and n.19. One of the reasons for doing do was that, if the limitations period for the claim against the employer is shorter than against the union, then the employee must effectively bring the action against both within the time for suing the employer or lose a large portion of the available damages. And yet the same facts -- CBA violation and DFR breach -- must be proved before the claim against either may succeed. *Id.* at 165.

The inevitable tension between the six-month limitations period and the exhaustion defense came to a head in *Frandsen v. BRAC*, 782 F.2d 674 (7th Cir. 1986). Given the time that it normally takes to complete intra-union appeals, the potential hybrid plaintiff is confronted by a Catch-22: if she sues within six months, the lawsuit may be dismissed for failure to exhaust, but if she exhausts before suing, the lawsuit may be dismissed as untimely. Moreover, it is often difficult to know in advance whether a court will exercise its discretion to require exhaustion. For this reason, the Seventh Circuit, in a unanimous opinion authored by Circuit Judge Joel Flaum, resolved this tension by holding that intra-union appeals **always** toll the statute of limitations against both the union and the employer, regardless of whether exhaustion was legally required.

Most lower courts that have considered this question have approved the *Frandsen* holding. *See Galindo v. Stoody*

Co., 793 F.2d 1502, 1510 (9th Cir. 1986); *Leach v. Pan American World Airways*, 651 F. Supp. 713, 716-717 (S.D. Fla. 1986), *rev'd in part on other grounds*, 842 F.2d 285 (11th Cir. 1988). *See also Stafford v. Ford Motor Co.*, 835 F.2d 1227, 1233 (8th Cir. 1987) (only union raised limitations defense). The Third Circuit originally ruled, similarly, that the timeliness of a hybrid action depends on when an intra-union appeal was concluded. *Scott v. Teamsters Local 863*, 725 F.2d 226, 229 (1984). Later Third Circuit decisions treat *Scott* as establishing a case-by-case test for tolling, depending on whether the intra-union appeal became futile and when the plaintiff should have realized its futility. *E.g.*, *Grasty v. Clothing Workers*, 828 F.2d 123, 133 (3d Cir. 1987). Circuit Judge Edward Becker suggested still another approach in his concurring opinion in *Scott* -- intra-union appeals would toll the statute, except that defendants could start the running of the statute of limitations by providing clear notice that they would foreswear any exhaustion requirement. 725 F.2d at 230-231. *See also Balsavage v. Ryder Truck Rental*, 712 F. Supp. 461, 470-472 (D.N.J. 1989). On the other hand, two district courts in the Sixth Circuit had taken the same approach as the ruling below, holding that the tolling effect of exhaustion depends entirely on whether exhaustion was legally necessary. *Smith v. Expert Automation*, 726 F. Supp. 1080, 1081 (E.D. Mich. 1988); *Brain v. Roadway Express*, 115 LRRM 2876, 2880-2881 (N.D. Ohio. 1981), *aff'd mem.*, 720 F.2d 678 (6th Cir. 1983).

In sum, then, the law in the circuits that represent the heartland of unionized America is in disarray concerning the proper effect to be accorded intra-union exhaustion on the tolling of the statute of limitations, and the decision below is not only squarely in conflict with other lower courts, but contrary to this Court's strong dicta urging that the claims against both union and employer should expire at the same time. For this reason alone, the Court should grant review here.

2. Review should also be granted because of the importance of the issue presented, the dangers posed by the decision below to federal labor policy, and the increase in needless litigation that is likely to result from it.

The *Frandsen* approach, under which exhaustion of intra-union remedies always tolls the statute against both the employer and the union, is far more consistent with this Court's decisions, and with federal labor policy, than the Sixth Circuit's approach under which the tolling effect of exhaustion depends on a highly discretionary, *post hoc* analysis of "all the facts." The Sixth Circuit approach has two highly unsatisfactory effects. First, in many cases, unsophisticated employees will guess incorrectly that exhaustion will be required, will exhaust their intra-union remedies, and will then be held to have filed their hybrid actions too late, against the employer if not also against the union. As the Court noted in *DelCostello*, if the statute runs out against the employer before the hybrid action is brought, even though the action against the union remains timely, "a large part of the damages will remain uncollectible in almost every case," 462 U.S. at 168, not to speak of forfeiting the opportunity to obtain reinstatement to employment. In that event, the DFR's ability to serve as a vital "bulwark to prevent arbitrary union conduct," *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), will be substantially undermined.

The other possible effect, and by far the more likely one, will be to encourage employees to bring a precautionary hybrid action immediately. If the employer then argues that the employee should have exhausted intra-union remedies before suing, then the action will be dismissed without prejudice to refiling if exhaustion is completed without satisfying the employee, or it will be stayed to permit exhaustion to go forward. In either event, the option to exhaust where *Clayton* allows exhaustion, but does not require it, will be eliminated, and the federal courts will have to cope with a substantial increase in wholly unnecessary litigation.

The need for a clear rule allowing exhaustion to toll the statute is especially great because it is rarely clear, in advance, whether a district court will exercise its discretion to require or excuse exhaustion in a particular case. This is true partly because the exhaustion requirement is riddled by exceptions, and partly because the application of each is within the trial judge's discretion. Moreover, a six-month limitations period leaves no margin for error in determining whether appeals are futile, or when they have become futile. *Cf. DelCostello*, 462 U.S. at 165-166 (because employees are often unsophisticated in such matters, and generally do not have counsel, a short limitations period can easily frustrate policies necessitating the hybrid remedy). Even lawyers who frequently represent employees in litigation of this sort find it hard to predict how a particular case will be treated in a particular district court. The *Frandsen* court noted this uncertainty in 1986, 782 F.2d at 682, and the problem remains as great now as it was then.

This case provides an excellent example of the difficulties of predicting the need for exhaustion. The court below thought that it was clear that an intra-union appeal could not achieve reinstatement of petitioner's grievance, and hence give her complete relief, but it appears far less clear when other facts are considered. For example, respondent Local 1196 initially asserted in its answer that petitioner's action should be dismissed because she failed to pursue her **additional** appeals, to the very end of the union process which, respondent asserted, could have provided her with complete relief. We assume that respondent raised this defense in good faith, after a reasonable inquiry into the underlying facts, yet the fact that it raised this exhaustion defense demonstrates how unclear the application of the *Clayton* exceptions can be in practice.

Moreover, section 14a of the CBA sets forth two circumstances in which a grievance could be reinstated after having been withdrawn by the union, and each of those circumstances might have applied here. First, the grievance

could be reinstated if "any agency" decided that the grievance was improperly withdrawn. Both respondents introduced affidavits in the district court asserting that the term agency had always been understood to include only "government" agencies such as the EEOC, and not "union agencies," such as the UAW's independent PRB. *See also* App. 29a. But surely that would not have been apparent from the perspective of most employees, who are often not highly educated and rarely have lawyers, not to speak of not having the benefit of precedent, hindsight and *post hoc* affidavits from the parties who negotiated the agreement. It is easy to see how many employees could assume that the PRB might qualify as "any agency," whose determinations would suffice to reinstate a grievance.

Section 14a also provides an open-ended opportunity for the reinstatement of a grievance, whenever the employer and union agree that a grievance was improperly withdrawn. An employee reading the CBA could easily conclude that this provision must be in the CBA for a reason, that the parties genuinely intended to use it, and that, if appeals within the union led to a determination at the international level that a grievance was improperly withdrawn, the local union might be instructed to find some way to secure the employer's agreement to reinstate the grievance. Indeed, had petitioner in this case made no effort to exhaust her union remedies, and had she sued within the six months following her discharge, we would be very surprised if both respondents had not moved for dismissal on exhaustion grounds. They could very easily have asserted that exhaustion might have provided her with complete relief, and that, had she made a compelling case in her intra-union exhaustion, of course they would have done the responsible thing by reinstating her grievance.

There are a number of post-*Clayton* cases where exhaustion has been required based on a side agreement between employers and unions (particularly the UAW) to reinstate grievances, if appropriate, even though the CBA did

not refer to that prospect, as the CBA in this case does, *e.g.*, *Miller v. General Motors Corp.*, 675 F.2d 146 (7th Cir. 1982) and even though the employee was utterly unaware of the side agreement. *E.g.*, *Monroe v. UAW*, 723 F.2d 22, 25, 26 (6th Cir. 1983). As the Sixth Circuit said in *Monroe*, "In the absence of knowledge to the contrary, a reasonable person expects that the appeal procedures would bring results: else why would they be provided and required?" 723 F.2d at 26.

For the past seven years, since the Seventh Circuit's decision in *Frandsen*, employees and their counsel have been able to assume that the safest way to pursue all possible claims of unfair representation and breach of the CBA was to exhaust their intra-union remedies. The decision below jeopardizes that approach, not only in the Sixth Circuit, but everywhere else in the country outside of Illinois, Indiana and Wisconsin.

3. As this Court said in *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 149-150 (1987), statute of limitations issues are ones in which the courts, as well as litigants on all sides, benefit from clear rules whose application is highly predictable. *Malley-Duff* involved the selection of limitations periods, but the same reasoning applies to rules for tolling the statute. *Bonds v. Coca-Cola Co.*, 806 F.2d 1324, 1327 (7th Cir. 1986). There is a direct conflict among the lower federal courts in both holdings and analysis of the tolling effect of intra-union exhaustion that is ultimately deemed not legally necessary. The issue is squarely presented by this case, and the disagreement needs to be resolved now, both to avert the flood of cautionary litigation that will be produced by the uncertainty caused by the decision below, and to safeguard the DFR's role as a bulwark for employees against arbitrary union action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 23, 1993

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 92-3090

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAROL ROBINSON,
Plaintiff-Appellant,

v.

CENTRAL BRASS MANUFACTURING COMPANY and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW LOCAL 1196,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed February 24, 1993

Before: MERRITT, Chief Judge; and MARTIN and BOGGS, Circuit Judges.

BOGGS, Circuit Judge. Plaintiff Carol Robinson appeals a grant of summary judgment in favor of Central Brass Manufacturing (Central Brass) and her union, Local 1196 of the International Union, United Automobile,

Aerospace and Agricultural Implement Workers of America (Union), related to her allegedly wrongful discharge from her job at Central Brass. We affirm the grant of summary judgment in favor of Central Brass, and we reverse the grant of summary judgment regarding the claim of breach of the duty of fair representation against the Union.

I

Central Brass discharged Carol Robinson for excessive absenteeism on October 24, 1989. Robinson filed a grievance regarding the discharge pursuant to the collective-bargaining agreement. Pursuant to paragraph "e" of the Grievance Procedure, Central Brass's Management Committee met with the Union's Shop Committee and a representative of the Regional Director of UAW on November 1, 1989. After the meeting, Central Brass denied the grievance and informed the Union of the denial on November 2, 1989.

Pursuant to Paragraph "f" of the Grievance Procedure, the Union had the right to arbitrate Robinson's grievance upon written request to Central Brass within ten working days of the denial. Thus, the Union had until November 16, 1989, to request arbitration. On November 9, 1989, the Union informed Robinson by letter that "the Bargaining Committee has decided your Grievance #16-89 lacks merit and should not be advanced to arbitration." The letter explained: "If you are not satisfied with this decision, you may appeal as provided for in Local #1196 By-Laws (Article 16) and the Constitution of the International Union (Article 33)." Attached to the letter was a copy of Article 16 of the Local's by-laws. Article 16, § 3 states:

> In no case shall a member appeal to a court \or governmental agency for redress until he has exhausted his rights of appeal under the laws of the International Union and the By-laws of this Local Union. Any violation thereof shall be cause for

> summary suspension or expulsion by the International Executive Board ....

Also attached to the letter was a copy of Article 33 of the UAW's constitution, which establishes an internal appeals process for union members with grievances against the Union. The process includes several steps, including an initial right of appeal to the membership of the local Union; a subsequent right of appeal to the International Executive Board; and a final right of appeal to the Convention Appeals Committee or if, as here, the complaint alleges that the grievance was improperly handled because of fraud, discrimination or collusion, to the Public Review Board.

This letter and these two attachments, however, did not tell the whole story. Many collective-bargaining agreements between the UAW and employers contain provisions whereby the employers agree to reinstate a grievance and to continue the grievance procedure if, upon internal union appeal, the grievance is found to have been improperly withdrawn. The UAW-Central Brass collective-bargaining agreement, however, did not contain such a provision. To the contrary, the UAW-Central Brass agreement allowed reinstatement *only* if 1) a court or government agency found improper withdrawal or 2) Central Brass and the Union both agreed to reinstate the grievance. Therefore, the internal appeals scheme explained in the letter could not have resulted in Robinson's reinstatement to her job.

The Union did not request arbitration by November 16, 1989. On December 28, 1989, Robinson exercised her right to appeal the Union's withdrawal of the grievance to the International Executive Board. A hearing was held on May 15, 1990. The appeal was denied on August 30, 1990. Robinson did not appeal to the last step, the UAW's Public Review Board. Instead, Robinson filed a complaint in federal court on November 1, 1990, against Central Brass and the Union. Robinson alleged that the Union breached its duty of fair representation. Robinson

alleged that Central Brass unfairly discharged her in violation of section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*; the Civil Rights Act of 1871, 42 U.S.C. § 1981; and an Ohio state statute prohibiting employers from discharging employees in retaliation for filing workers' compensation claims, Ohio Rev. Code Ann. § 4123.90 (Baldwin 1982). Robinson sought reinstatement in her job and monetary damages.

On April 11, 1991, the district court granted Central Brass's motion for summary judgment. Of specific importance for this appeal was the district court's finding that the hybrid § 301/ fair representation claim was barred by a six-month statute of limitations. On December 19, 1991, the court granted the Union's motion for summary judgment.

On appeal, Robinson only challenges the district court's ruling that the hybrid § 301/ fair representation claim was barred by the six-month statute of limitations. Robinson did not oppose either Appellee's motion for summary judgment on the remaining claims and has not briefed those issues on appeal.

II

As with many federal statutes, Congress did not provide a specific statute of limitations for § 301 claims. Nor has Congress prescribed a statute of limitations for claims that a union breached its duty of fair representation to its members. In fact, the duty of fair representation is not an express creation of Congress; the Supreme Court has found that "it is implied under the scheme of the National Labor Relations Act." *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164, 103 S. Ct. 2281, 2290, 76 L. Ed. 2d 476 (1983); *see also Vaca v. Sipes*, 386 U.S. 171, 182, 87 S. Ct. 903, 912, 17 L. Ed. 2d 842 (1967).

When no statute of limitations is provided, courts generally assume that Congress intended the courts to borrow the statute of limitations for the most closely analogous state law claim. *DelCostello*, 462 U.S. at 158, 103 S. Ct. at 2281. The Supreme Court, however, has recognized a limited exception to the general rule when the state statute of limitations conflicts with the federal interests and congressional purposes of the federal statute. 462 U.S. at 161, 103 S. Ct. at 2289. In its search for the appropriate statute of limitations for hybrid § 301 claims, the Supreme Court turned to the National Labor Relations Act ("NLRA"), which it described as "actually designed to accommodate a balance of interests very similar to that at stake here -- a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state law parallels." 462 U.S. at 169, 103 S. Ct. at 2293. The Court identified the balance of interests present in both the hybrid § 301 claim and NLRA claims as "the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interests in setting aside what he views as an unjust settlement under the collective-bargaining system." 462 U.S. at 171, 103 S. Ct. at 2294 (quoting *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 70, 101 S. Ct. 1559, 1568, 67 L. Ed. 2d 732 (1981)). In addition, the Court found that a union's breach of the duty of fair representation has an undeniable "family resemblance" to and "substantial overlap" with unfair labor practices covered by NLRA. 462 U.S. at 170, 103 S. Ct. at 2293-94. Similarly, the Court determined that employers' violations of a collective-bargaining agreement under § 301 may also amount to unfair labor practices under NLRA. 462 U.S. at 170, 103 S. Ct. at 2294. Therefore, the Court borrowed the six-month statute of limitations of NLRA § 10(b).

The Supreme Court, however, did not address the issues of when a cause of action accrues in a hybrid § 301 claim and when the statute of limitations begins to run. These issues are complicated by the unique nature of a hybrid § 301 claim. It is, in fact, the consolidation of two

separate but interdependent actions: one against the employer for breach of the collective-bargaining agreement and one against the union for breach of the duty of fair representation. Before an employee may bring a § 301 claim against an employer for dismissing him in violation of the collective-bargaining agreement, the employee first must exhaust any grievance or arbitration remedies provided in the collective-bargaining agreement. The employee will be bound by the results of that grievance process unless the union representing the employee breaches its duty of fair representation. If the union does breach its duty, then the employee may bring either a § 301 claim against the employer or a claim against the union for breach of the duty of fair representation, or both claims simultaneously. To prevail under any claim, the employee must show both that the employer discharged him in violation of the collective-bargaining agreement *and* that the union breached its duty of fair representation during the grievance process. Therefore, the two claims are often combined in a single lawsuit and referred to as a hybrid § 301/ fair representation claim. *See DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 163-65, 103 S. Ct. 2281, 2290-91, 76 L. Ed. 2d 476 (1983).

In general, "[a] claim accrues ... when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation." *Adkins v. International Union of Electrical, Radio & Machine Workers*, 769 F.2d 330, 335 (6th Cir. 1985); *see also Jones v. General Motors Corp.*, 939 F.2d 380, 384 (6th Cir. 1991). In *Proudfoot v. Seafarer's International Union*, 779 F.2d 1559, 1560 (11th Cir. 1986), the Eleventh Circuit ruled that the separate causes of actions in a hybrid § 301/ fair representation claim accrue simultaneously, and that "the timeliness of the suit must be measured from the date on which the employee knew or should have known of the union's final action or should have known of the employer's final action, whichever occurs later." *Ibid.*

Following this rule, Robinson's cause of action against both defendants accrued on November 17, 1989, when the deadline for requesting arbitration passed without action by the Union. However, this does not necessarily mean that the statute of limitations began to run on November 17, 1989. Robinson contends that the six-month limitations period for the claims against both defendants did not begin until she exhausted her internal union appeals. In the alternative, Robinson argues that the limitations period should be equitably tolled because the Union and Central Brass conspired to mislead her into thinking that the internal appeals process could provide complete relief.[1] Although the causes of actions against both defendants accrued simultaneously, it does not necessarily follow that the statutes of limitations for the two interdependent claims began to run simultaneously. Therefore, we will address the merits of Robinson's tolling arguments on each claim separately.

III

A

The district court rejected Robinson's argument that the limitations periods for both actions were not running while she pursued the internal union appeals mentioned in the union's letter. The district court reasoned that the union appeals process was optional and not mandatory because it could not provide Robinson with complete relief from either defendant. Therefore, since Robinson was not required to exhaust the union appeals process

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[1]Robinson also urges this court to declare the six-month statute of limitations set forth by the Supreme Court in *Delcostello* to be "so short as to constitute a violation of a union member's right to due process under the Amendment XIV of the U.S. Constitution." We cannot address this issue. First, the issue was not raised below. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is a general rule ... that a federal appellate court does not consider an issue not passed on below."). More important, we have no authority to overrule the Supreme Court. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983).

before filing suit in federal court, the statute of limitations was not tolled against either defendant.

The district court relied exclusively on *Clayton v. International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America*, 451 U.S. 679, 101 S. Ct. 2088, 68 L. Ed. 2d. 538 (1981), and *Smith v. Expert Automation, Inc.*, 726 F. Supp. 1080 (E.D. Mich. 1988). The facts in *Clayton* are very similar to the facts in this case. Clayton was discharged by ITT Gilfillan (ITT) for violating a well-defined plant rule. The union filed a grievance on Clayton's behalf, and ITT denied the grievance. The union initially requested arbitration, but then withdrew the request. The union informed Clayton by letter that the union chose not to request arbitration. Like the letter in the instant case, Clayton's letter also contained a copy of section 33 of the UAW constitution and notification of the requirement that he exhaust all internal union appeals before seeking redress from a civil court or government agency. Also like the instant case, pursuant to the collective-bargaining agreement between the union and ITT, the internal union appeals procedure could not result in either Clayton's reinstatement or reactivation of his grievance.

Unlike Robinson, Clayton chose not to file an internal appeal and instead went directly to federal court with a hybrid § 301/ fair representation claim against ITT and the union. ITT and the union argued for dismissal on the ground that Clayton had not exhausted his internal union remedies.

The Supreme Court began its analysis by recognizing that Clayton's claim highlighted a conflict between the federal policy requiring that a judicial forum be available to enforce the duty of fair representation and the policy of encouraging private resolution of disputes. The Court emphasized that district courts have discretion to decide whether to require exhaustion and enumerated three factors to be considered in exercising that discretion:

> [F]irst, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under § 301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. If any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust.

Id. at 689. Highlighting the second factor, the Supreme Court ruled "that where an internal union appeals procedure cannot result in reactivation of the employee's grievance or an award of the complete relief sought in his § 301 suit, exhaustion will not be required with respect to either the suit against the employer or the union." *Id.* at 685.

The union argued that since the monetary damages remedy sought in the claim against it could be achieved in the internal appeals process, exhaustion still should be required for the related claim against it. The Court rejected this argument. If it permitted the action to proceed against the employer and required exhaustion as to the union, two § 301 suits based on the same facts would be proceeding through the courts at different paces. Therefore, the Court concluded that the most efficient procedure would be to allow the § 301 action to proceed against the union as well. *Id.* at 694-95.

The *Clayton* Court did not address the question of whether the statute of limitations should be tolled if a discharged employee chose to pursue the appeals process before filing a hybrid § 301/ fair representation claim. In *Smith v. Expert Automation, Inc.*, 726 F. Supp. 1080 (E.D. Mich. 1988), the district court, when faced with this issue, ruled that the reasoning in *Clayton* led to the conclusion that the statute of limitations should be tolled

only when the internal appeals process can provide a complete remedy. The claim arose from an alleged breach by Expert Automation of the seniority provisions of the collective-bargaining agreement and the subsequent refusal of the union to represent the plaintiff in the grievance process. Smith attempted to exhaust his internal appeals against the union for monetary damages before suing the union and Expert Automation in federal court. Like the instant case, the internal appeals process could not provide the plaintiff with complete relief against the employer. *Id.* at 1081. The court ruled that "the plaintiff could neither have reactivated his grievance nor obtained complete relief through intra-union proceedings, and therefore, since the intra-union remedies are optional, the case must be dismissed as untimely under the applicable statute of limitations." *Id.* at 1082-83. The court explained its rejection of the tolling option, reasoning that if tolling were allowed:

> [A] plaintiff could opt for an internal procedure insufficient to conclude in complete relief, and dependant on the outcome, either relitigate the entire dispute or simply seek a judicial determination of the issue omitted from the union proceeding. Obviously, such a system is contrary to a policy favoring speedy resolution of labor disputes.

Id. at 1081.

In *Frandsen v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees*, 782 F.2d 674 (7th Cir. 1986), the Seventh Circuit followed the reasoning in *Clayton* to a different conclusion, ruling that "the *DelCostello* statute of limitations is tolled by the pursuit of internal union remedies, even where those remedies are ultimately determined to have been futile." *Id.* at 681. In 1982, Frandsen was an employee with thirty-eight years of seniority with Consolidated Rail Corporation ("Conrail"). That year, Missouri Pacific Railroad Company

("MOPAC") purchased from Conrail the stretch of track on which Frandsen and eight other Conrail employees worked. The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees ("Union"), which represented the employees of both companies, presented Frandsen and the eight other employees with the choice of either remaining in their present jobs and switching employers or remaining with their present employer and moving to a new work station. Frandsen chose to remain in the same job and switch employment to MOPAC. Frandsen made this choice because he understood that he would retain his seniority status. However, at the time Frandsen had to make his choice, the collective-bargaining agreement had not been completed yet. When the agreement was completed, Frandsen lost all of his seniority status and began work for MOPAC as its most junior employee.

Frandsen immediately protested the terms of the agreement by filing an internal union appeal. However, he did not sue the union for breach of its duty of fair representation until March 7, 1984, almost two years after the agreement was completed, but less than six months from the conclusion of the internal union appeals process. The district court followed the same analysis as the court in *Smith*, concluding that Frandsen's claim was barred by the statute of limitations. The court succinctly stated its reasoning: "if the plaintiff reaps the benefit from the no exhaustion rule, he must also pay the costs." *Frandsen v. Brotherhood of Railway, Airline and Steamship Clerks*, 601 F. Supp. 941, 944 (S.D. Ill. 1985).

The Seventh Circuit overruled the district court and held that Frandsen's claim against the union was not barred by the statute of limitations even if the internal union appeals procedure could not provide him with complete relief. The Seventh Circuit listed four reasons supporting its conclusion.

First, the court stated that a "no tolling" rule would contravene the dual federal policy of promoting private

resolution for disputes through internal union remedies and ensuring a judicial forum to resolve disputes. The court stressed that in *Clayton* the Supreme Court did not disavow this goal, but only created a narrow exception to the general exhaustion requirement for situations where the internal remedies are futile. The court stressed that:

> This exception is designed to confer a benefit to the employee, and there is no language in *Clayton*, or in any other Supreme Court case, that suggests the worker must pay a cost to get this benefit. It may even be unwise to call the *Clayton* exception a benefit when the worker has a right to a federal forum that Congress delays only for policy reasons .... [T]he core of the duty of fair representation is to protect the rights of individuals that are limited by the NLRA. *Clayton* was not designed to further frustrate access to a federal forum that the national labor policy already compromises.

Id. at 681. In other words, in *Clayton* the Supreme Court only ruled that, when complete relief is impossible, exhaustion of internal remedies is not required. The Court did not exclude internal remedies as an option. A ruling that the statute of limitations begins to run as soon as the grievance process breaks down would eliminate the option of internal remedies. The only viable option for an employee who does not want to forfeit access to the federal courts would be to forego the internal union appeals process and seek relief in federal court immediately.

Second, and closely related to the first reason, the Seventh Circuit feared that a "no tolling" rule would create an incentive for plaintiffs to bring suit in federal court before seeking internal union remedies as a cautionary measure. The ensuing "flood of cautionary litigation... [would] undermin[e] the very policy behind the exhaustion rule." *Id.* at 684.

Third, the Seventh Circuit pointed out that in *Clayton* the Supreme Court did not divest the district courts of discretion to decide whether or not exhaustion is required under specific circumstances. On the contrary, the *Clayton* Court emphasized the importance of the district courts' discretion. Thus, although in hindsight it may be clear that a plaintiff's internal union remedy was futile, it is not always clear from the outset. Therefore, the Seventh Circuit concluded that "[w]hether or not ... [an] intraunion appeal was futile ... represents a distinction too problematic to be the determinative question in each case of this kind." *Id.* at 682.

Finally, the Seventh Circuit pointed out that an internal appeals process need not provide complete relief in order to be fruitful to the plaintiff or beneficial to the judicial system.

> ... [I]f partial relief is obtained, the marginal increase in relief obtained in litigation may not be worth the corresponding increase in expense and risk. The intraunion grievance system may also persuade the member that a claim is not so strong as it might have seemed, or may produce a genuine compromise. The pursuit of nonjudicial procedure may, if perceived as fair, have a conciliatory or therapeutic value that lessens the employee's perceived need to file suit.

Id. at 683.

B

We find the majority of the reasoning in *Frandsen* persuasive. However, we part company with the Seventh Circuit on two crucial points. The Seventh Circuit held that "the statute of limitations is tolled by the pursuit of internal union remedies, ***even where those remedies are ultimately determined to have been futile.***" *Id.* at 681 (emphasis added). We disagree. First, in order for the statute of limitations to be tolled, the internal union appeal

must be able to afford the claimant *some* relief from the defendant. Tolling the statute of limitations while a claimant pursues *completely* futile internal union remedies does not serve the federal interests discussed in *DelCostello* and *Clayton* and is unfair to the defendant. On the other hand, we recognize that in some cases it may be difficult for an employee, even after the exercise of due diligence, to determine that the internal union remedies are completely futile and that this difficulty must be considered by the court. Second, we emphasize that whether to toll the limitations period is a question within the discretion of the district court. Thus, we are reluctant to set out bright line rules. Each case must be analyzed on its own facts in light of the three factors stressed in *Clayton* and the four-part test outlined in *Frandsen*.

1

With these principles in mind, we affirm the district court's holding that Robinson's claim against Central Brass was barred by the six-month limitations period. It is important to remember that following her discharge, Robinson sought relief in two private settlement processes. First, the Union filed a grievance on Robinson's behalf with Central Brass pursuant to the arbitration and grievance procedure set forth in the collective-bargaining agreement. This process could have provided Robinson with complete relief from Central Brass -- reinstatement in her job. Thus, the limitations period was tolled until Central Brass denied the grievance and the Union did not request arbitration.

Robinson then appealed the Union's decision not to request arbitration in the internal union appeals process. Central Brass was not a party to this internal appeal, had not sanctioned or acknowledged the internal appeals process, and was not bound by any ensuing judgment. In fact, Central Brass has made clear in the collective-bargaining agreement that a successful internal union appeal can not lead to reinstatement of an employee or reactivation of a grievance. In general, a union member

is responsible for knowing the contents of her collective bargaining agreement. *Shapiro v. Cook United, Inc.*, 762 F.2d 49, 51 (6th Cir. 1985). Thus, it should have been clear to Robinson that when the Union chose not to request arbitration, the *only* private dispute mechanism that could have provided her with relief from Central Brass was exhausted and the limitations period began to run.

This conclusion is consistent with the federal policies implicated in labor cases concerning exhaustion of internal appeals. The federal interest in the swift resolution of labor disputes would not be served by tolling the limitations period in the § 301 suit against Central Brass while Robinson pursued internal appeals that could only provide relief from the Union. Likewise, the federal interest in the private settlement of labor disputes would not be furthered by tolling the limitations period while Robinson pursued a private settlement with the Union.

We recognize that Robinson misunderstood the nature of the possible internal remedies and thought that they included reinstatement. However, as we discuss below, this misunderstanding was caused solely by the Union's misrepresentations and cannot be linked to Central Brass's actions, statements, or policies. Therefore, we hold that Robinson exhausted all internal remedies for her claim against Central Brass when the Union failed to request arbitration and thus her § 301 claim against Central Brass is barred by the six-month statute of limitations period.

2

On the other hand, we reverse the district court's ruling that Robinson's claim that the Union breached its duty of fair representation is barred by the statute of limitations. Robinson's claim against the Union is distinguishable from the claim against Central Brass because although the internal appeals process could not provide complete relief, it clearly provided the possibility of partial relief from the Union in the form of monetary damages. Therefore, the

internal appeals process did provide the opportunity for a private settlement of the claim against the Union. Also, even if the internal appeal proved unsuccessful, it could still be beneficial to the judicial system. As the Seventh Circuit pointed out in *Frandsen*, an unsuccessful internal appeal may convince a union member that her claim lacks merit, may produce a compromise, and may have other conciliatory value that could lessen a member's desire to file suit in federal court. *Frandsen*, 782 F.2d at 683.

Our holding that Robinson's claim against the Union is not time-barred is consistent with our holding in *Dunleavy v. Local 1617, United Steelworkers*, 814 F.2d 1087 (6th Cir. 1987). There, Dunleavy was expelled from the office of recording secretary and suspended from holding elective office for five years because he had allegedly violated provisions of the union constitution. We ruled that the limitations period was tolled while Dunleavy pursued internal remedies, even though we concluded that internal exhaustion was not mandatory. *Id.* at 1090.

In reaching this conclusion, we stressed that, as in the present case, the union constitution and by-laws required Dunleavy to exhaust all internal appeals and remedies before instituting an action in federal court. We concluded: "It is a dubious position that the union takes when it asserts that it was only extending an optional appeal path for its members to choose and then penalizing the union member if the 'optional' appeal was not chosen." *Ibid.* In this case, pursuant to the union by-laws, Robinson could have been penalized, and even expelled, for filing suit in federal court before exhausting the internal appeals process. Therefore, the reasoning in *Dunleavy* is particularly applicable to Robinson's predicament.

In *Dunleavy*, we also stressed that tolling the statute of limitations was consistent with the general purposes of statutes of limitations. In *Burnett v. New York Central R.R.*, 380 U.S. 424, 428 (1968), the Supreme Court explained that statutes of limitations "promote justice by

preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Like Dunleavy, Robinson diligently pursued through the internal appeals process the same claims that she now brings in federal court. Therefore, the Union cannot claim that it lacked notice as to the nature of Robinson's claim or that the relevant evidence is no longer extant. *See id.* at 1090-91.

Finally, our objection in *Dunleavy* to the Union's argument that the limitations period should run while a member pursues internal remedies bears repeating:

> The Union's position would seem to require one placed in Dunleavy's situation to file a lawsuit which would become superfluous in the event of favorable Convention action simply as a matter of protection. In addition to other practical objections to such filings, we feel constrained to point out that we would be loath to require further cluttering up the docket of the overburdened federal judicial system for such a contingent purpose.

Id. at 1091.

A ruling that Robinson's claim against the Union is time-barred would undermine the federal policy of promoting private resolution of disputes while ensuring a judicial forum to resolve disputes. Therefore, we hold that the statute of limitations period for Robinson's claim against the Union was tolled while Robinson pursued internal union remedies. We stress again that in this case the fair representation claim against the Union is distinguishable from the § 301 claim against Central Brass. The internal appeals process could have provided Robinson with partial relief from the Union. In contrast, the internal appeals process could not provide *any* relief from Central Brass. Also, the Union was involved directly in the internal appeals process and even required,

in the strongest terms, that Robinson pursue internal remedies before instigating a federal suit. In contrast, Central Brass had no involvement with and refused to recognize the internal appeals process.

IV

Robinson also alleges that the Union acted in bad faith, committed fraud, and engaged in a continuing conspiracy with Central Brass to misled her into thinking that the internal appeals process could provide complete relief. This court has recognized that a statute of limitations should be tolled if a defendant fraudulently concealed any facts respecting the accrual or merits of a plaintiff's claim. *Shapiro v. Cook United, Inc.*, 762 F.2d 49, 51 (6th Cir. 1985). In order to prove fraudulent concealment, a plaintiff must show "that he failed to discover facts that serve as the basis of his cause of action despite due diligence on his part to discover the facts, and that the concealment was fraudulently committed by the parties sought to be held responsible by the plaintiff." *Ibid.*

There is ample evidence that the Union misled Robinson about both the possible remedies of an internal appeal and the necessity to pursue internal remedies before instigating an action in federal court. In the November 9, 1989 letter, the Union provided Robinson with the option of pursuing her claim further through an internal appeal. The Union even provided Robinson with the relevant section of the Local UAW by-laws and the UAW constitution. The Union, however, left out critical information. It did not advise Robinson that such an appeal would be futile with respect to the primary remedy she sought -- getting her job back. Nor did the Union reveal that it *could* (and ultimately would) claim that the internal appeal procedure it was demanding was also exhausting her time to sue and thus barring the only efficacious route to the goal of reinstatement. On December 28, 1989, Robinson informed the Union by letter that she wanted to exercise her right to appeal the Union's decision not to advance her grievance to

arbitration. She specifically listed as the remedies she sought "arbitration of the decision to discharge me for absenteeism" and "reinstatement with back pay." The Union did not correct Robinson's misunderstanding of the possible internal remedies; instead, it simply processed her appeal.

Moreover, the Union explicitly warned Robinson that pursuant to the by-laws she would be subject to discipline and even summary expulsion if she filed a suit in federal court before exhausting internal remedies. At oral argument, counsel for the Union claimed that these provisions are rarely enforced and that in reality Robinson was free to file suit in federal court before exhausting internal remedies without fear of discipline or retaliation. This may be true, and apparently Robinson was not disciplined when she filed suit in federal court before exhausting the final step of the internal appeals process. However, the Union's letter of November 9, 1989, and the union by-laws describe a very different picture of Robinson's options -- pursue internal remedies first or risk summary expulsion from the Union.

Because we have already held that the statute of limitations for Robinson's claim against the Union was tolled while she exhausted her intraunion remedies, we need not decide whether the Union's misleading conduct rose to the level of fraudulent concealment. Also, the Union's actions do not change our conclusions with respect to the claims against Central Brass. The Union's actions cannot be imputed to Central Brass, and misrepresentations made by third parties cannot be the basis for equitable tolling against a defendant. *Germete v. General Motors Corp.*, 609 F.2d 1200, 1203 (6th Cir. 1979). Robinson has made no allegations of misrepresentation by Central Brass other than vague charges of conspiracy with the Union that are not supported by any evidence. Moreover, the collective-bargaining agreement between Central Brass and the Union clearly states the limited circumstances under which a withdrawn grievance will be reinstated:

> If the Company and the Union mutually agree that an employees' [sic] grievance was improperly withdrawn from the grievance procedure by the Union, or any agency or court decides that an employees' [sic] grievance was improperly withdrawn, the grievance shall be reinstated in the grievance procedure at the step from which it was withdrawn.

Therefore, because Central Brass made no misrepresentations to Robinson and clearly stated the circumstances under which it allows reinstatement of improperly withdrawn grievances, the statute of limitations in Robinson's claim against Central Brass should not be equitably tolled. We point out that the dismissal of Robinson's claims against Central Brass does not preclude Robinson from achieving her ultimate goal of reinstatement. If, on remand, the district court were to find that Robinson's grievance was improperly withdrawn, Central Brass will be bound by the collective-bargaining agreement to allow the grievance to be reinstated and to continue into arbitration.

V

For the foregoing reasons, we AFFIRM the district court's dismissal of all claims against Central Brass, and we REVERSE the district court's dismissal of the fair representation claim against the Union and REMAND for proceedings consistent with our decision.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CAROL ROBINSON	:	CASE NO. 1:90CV1949
Plaintiff	:	HON. GEORGE W. WHITE
vs.	:	
THE CENTRAL BRASS MANUFACTURING COMPANY, et al.	:	*MEMORANDUM AND ORDER*
Defendants	:	

This action arises under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185; Title *VII* of the Civil Rights Act of 1964, 42 U.S.C. §2000e-et seq; the Civil Rights Act of 1870, 42 U.S.C. §1981 and includes a state pendent claim under Ohio Revised Code Section 4124.90. The plaintiff alleges that the defendant Central Brass Manufacturing Company (Company) breached its collective bargaining agreement and that the defendant International Union, United Automobile, Aerospace and Agriculture Workers of America Local No. 1196 (Union) breached its duty of fair representation concerning plaintiff's discharge from employment. She also claims she was discharged because of her race and that she was terminated for filing a workers' compensation claim. The defendant Company filed a motion for summary judgment arguing that the plaintiff's Labor, Title *VII* and state claims are barred by the statute of limitations and plaintiff has not stated a cause of action under §1981.

The United States Supreme Court held in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), that claims for breach of contract against an employer and breach of duty of fair representation against a union are subject to the six months statute of limitations applicable to unfair labor practice claims under Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). The action accrues when the plaintiff discovers or in the exercise of reasonable diligence should have discovered the acts constituting the violation. *Adkins v. International Union of Electrical, Radio and Machine Workers*, 769 F.2d 330, 335 (6th Cir. 1985). It has been held that the six month statute of limitations is tolled during the time when internal union remedies are being pursued. *Frandsen v. Brotherhood of Railway, Airline & Steamship Clerks*, 782 F.2d 674 (7th Cir. 1986); *Walker v. Teamsters Local 71*, 714 F.Supp. 178, 188 (W.D. N.C. 1989).

Plaintiff states that she received a letter from the Union informing her that the Bargaining Committee decided that her grievance had no merit and should not be advanced to arbitration and that she had the right to appeal this decision under the Local No. 1196 By-Laws, Article 16. Article 16 of the By-Laws provides:

> Section 1 - Any member of this Local Union shall have the right to appeal. (Note: See Article 33 of the International Constitution).
>
> Section 2 - Any member of the Local Union, after first having exhausted every appeal step within the Local Union, may appeal from any action, decision or penalty to the International Executive Board and to the International Convention. However, the

> decision of the Local Union must be complied with and shall remain in effect until reversed or modified.
>
> Section 3 - In no case shall a member appeal to a court or governmental agency for redress until he has exhausted his rights of appeal under the laws of the International Union and the By-Laws of this Local Union. Any violation thereof shall be cause for summary suspension or expulsion by the International Executive Board insofar as imposition of any such penalty is not inconsistent with any applicable laws.

Plaintiff appealed as instructed. A hearing was held in May, 1990. As of the present time, plaintiff has not received notice of a decision of her appeal.

The grievance procedure in the collective bargaining agreement provides in paragraph g,

> "In the event a grievance is not filed or processed within the time limits set forth in Paragraphs a, b, c, e and f above, it shall be barred from further processing in the grievance and arbitration procedures."

Plaintiff's next step in the grievance procedure would have been pursuant to paragraph f requiring that arbitration must be requested within 10 working days from the Company's written answer in paragraph e. In other words the Union told the plaintiff her grievance was terminated as far as the Union was concerned but she could appeal this decision if she desired. However, the provision of the collective bargaining agreement bars her from processing her grievance any further.

Clayton v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, 451 U.S. 679, 101 S.Ct. 2088, 68 L.Ed.2d 538 (1981), dealt with the issue of the requirement of exhaustion of union

remedies as prerequisite to filing a lawsuit. The Court held that where an internal union appeals procedure cannot result in reactivation of the employee's grievance or an award of complete relief, such as reinstatement, exhaustion will not be required with respect to a suit against the employer or the union. *Id* 451 U.S. at 685, 101 S.Ct. at 2093. In *Clayton*, the Court was asked to require exhaustion of internal union procedures. The procedures were created by the union and were not bargained for by the employer and union and were not mentioned in the collective bargaining agreement. The same facts apply to the case at bar. The Court in *Clayton* ruled that requiring exhaustion under those circumstances would be futile. The Court also disagreed with the union's argument that even if exhaustion is not required with respect to the employer it should be required with respect to union remedies. Since the plaintiff was suing the employer as well as the union exhaustion should not be required because the Court would have to resolve two undesirable alternatives. If it stayed the action against the employer while the internal union appeals were being resolved it would actually be requiring exhaustion with respect to the employer, a result the Court ruled would violate national policy. If it permitted the action to proceed against the employer and tolled the statute of limitations as to the union until the union procedures had been exhausted, there could be two §301 suits based on the same facts proceeding at different paces. So the Court decided the best procedure would be to allow the §301 action to proceed against the employer and the union despite the plaintiff's failure to exhaust internal union remedies.

Based on *Clayton* defendant Company argues that plaintiff did not have to exhaust her internal union remedies and should have filed her §301 action within six months of the time she received notice that the Union would not pursue her grievance.

The Court in *Smith v. Expert Automation, Inc.*, 726 F.Supp 1080 (E.D. Mich. 1988), used the *Clayton* case as guidance in holding that the six months statute of limitations

in a hybrid Labor Management Relations Act case is not tolled during the resolution of optional internal union proceedings. The Court noted that common sense suggests that the limitations period should be tolled when a plaintiff can decide whether to exercise optional union remedies. It was reasoned that if this were allowed a plaintiff could opt for an internal union procedure insufficient to conclude in complete relief, and depending on the outcome, either relitigate the entire dispute or simply seek a judicial determination of the issue omitted from the union proceeding. This would be contrary to the public policy of favoring speedy resolution of labor disputes. *Id* at 1081.

As previously stated, plaintiff's Union appeal could not have resulted in reinstatement of her grievance or reinstatement to her job. The letter she received from the Union informing her that her grievance would not be advanced to arbitration advised that she may appeal that decision under the Union By-Laws. The appeal was optional, not mandatory. The statute of limitations was not tolled. Therefore, the company's motion to dismiss the §301 claim is **granted**.

The plaintiff has not responded to defendant's remaining arguments. Title *VII* requires that an action be filed with the federal court with 90 days from receipt of the notice of right to sue from the EEOC. 42 U.S.C. §2000e-5(f). This is not a jurisdictional prerequisite to filing a suit, but is analogous to a statute of limitations which is subject to waiver, estoppel and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982); *Ruiz v. Shelby County Sheriff's Department*, 725 F.2d 388, 390 (6th Cir. 1984). Plaintiff has not argued that the statute of limitations is tolled or that equitable estoppel applies as to her Title *VII* claim. The evidence before the Court shows that defendant received notice of right to sue in February, 1990. Plaintiff should have received notice about that time. The action was filed October 24, 1990. In order to have filed within 90 days

from the receipt of the notice of right to sue, the notice must have been received after July 26, 1990. Plaintiff is silent in this regard despite having benefit of defendant's argument and also failed to answer a request for admission on this question.[1] Plaintiff could not claim to be relying on Article 16 of the By-Laws because she filed her EEOC Charge in February, 1990 after she received the notice of right to appeal the denial of her grievance that included the letter warning her not to appeal to a government agency while her appeal was pending. Also, the Title *VII* case is a separate claim to which the Article 16 provisions have no application.

Plaintiff's fourth cause of action alleges that plaintiff was wrongfully terminated for filing a workers' compensation claim in violation of Ohio Revised Code Section 4123.90. Ohio Revised Code Section 4123.90 provides in pertinent part:

> "No employer shall discharge . . . or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury to occupational disease which occurred in the course of and arising out of his employment with that employer. Any such employee may file an action in the common please court of the county of such employment ... . The action shall be forever barred unless filed within one hundred eighty days immediately following the discharge ... or punitive action taken, and no action may be instituted or maintained unless the employer has received written notice of a claimed violation of this paragraph within the ninety days immediately

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[1] Rule 36 of the Federal Rules of Civil Procedure provides that a matter is admitted if not answered.

following the discharge ... or punitive action taken."

Defendant has never received the required notice, nor was the action filed with 180 days from the date of discharge. Therefore, summary judgment must be granted on the state pendent claim.

A cause of action for race discrimination under 42 U.S.C. §1981 was also included. The United States Supreme Court in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), held that §1981 protects the right to make and enforce contracts. But the right to make contracts extends only to the formation of a contract and not to problems that may arise during the employment. *Id.* at 2373. Section 1981 also protects against efforts to impede access to the Courts or obstruct nonjudicial methods of adjudicating disputes. *Id.* Plaintiff's claim involves conduct after the formation of the employment relationship. It does not involve the impediment of access to the courts. Plaintiff has not stated the existence of any nonjudicial remedies. The complaint alleges discharge on account of race. Discharge occurs after the formation of a contract and is not protected by §1981. Discriminatory treatment after one is employed also occurs after the formation of a contract. Plaintiff has not alleged failure to promote her on account of race. *See Overby v. Chevron USA, Inc*, 884 F.2d 470, 473 (9th Cir. 1989); *Greggs v. Hillman Distributing Company*, 719 F.Supp 552, 554 (S.D. Tex. 1989); *Copperridge v. Terminal Freight Handling*, 50 FEP Cases 812, 813 (WD Tenn. 1989).

Accordingly, the Company's motion for summary judgment is **granted** as to all of plaintiff's claims against it.

IT IS SO ORDERED.

/s/

George W. White
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CAROL ROBINSON	:	CASE NO. 1:90CV1949
	:	
Plaintiff	:	HON. GEORGE W. WHITE
	:	
vs.	:	
	:	
THE CENTRAL BRASS MANUFACTURING COMPANY, et al.	:	*MEMORANDUM AND ORDER*
	:	
Defendants	:	

On April 11, 1991, the Court granted the Company's motion for summary judgment in this action brought under the Labor Management Relations Act, 29 U.S.C. §185, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq, the Civil Rights Act of 1870, 42 U.S.C. §1981 along with a state claim under Ohio Revised Code Section 4124.90. The plaintiff did not address the defendant's arguments concerning the Title VII, §1981 and the state claims. The Court determined that the claim under the Labor Management Relations Act was barred by the sixth month statute of limitations found in Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). The Union has now filed a motion for summary judgment on the same grounds.

The plaintiff argues that the statute of limitations was tolled while she was pursuing her internal union remedies.

The Union decided that her grievance had no merit and that it would not be advanced to arbitration. The notice she received from the Union provided that she may appeal this decision and that she could not appeal to a court or governmental agency until her rights of appeal under the laws of the Union were exhausted. Article 16 of the Local No. 1196 By-Laws. The Court held that plaintiff's Union appeal could not have resulted in reinstatement to her job and that the appeal was optional, not mandatory. Therefore, the statute of limitations was not tolled.

It is asserted by plaintiff that the Local Union By-Laws and the International Union's Constition forbade lawsuits until completion of internal union procedures. Plaintiff should not be penalized for attempting to abide by the Union's By-Laws and Constitution.

The Union requires exhaustion under its rules before a member may file suit against it. However, the Collective Bargaining Agreement between the Union and the Company provided in paragraph g,

> "In the event a grievance is not filed or processed within the time limits set forth in Paragraphs a, b, c, e and f above, it shall be barred from further processing in the grievance and arbitration procedures."

The Union withdrew plaintiff's grievance so it was not processed within the required time limits. The result was that it was barred from further processing. Even if plaintiff was successful in her internal union appeal she could not get reinstatment or anything else from the Company. As far as the Company was concerned the grievance was terminated when the Union did not timely continue processing it. Plaintiff should not be required to exhaust Union remedies if to do so would be futile. *Bee v. Local 719, United Auto Workers*, 744 F.Supp. 835, 837 (N.D. Ill 1990). Exhaustion of internal remedies in this case should be optional, not mandatory where exhaustion could not bring about the

desired goal of reinstatement of the grievance. It appears that the Union By-Laws and Constitution are inconsistent with the Collective Bargaining Agreement. Furthermore, requiring plaintiff to pursue internal union remedies should not be mandatory if it would create an unreasonable delay. *Id.* Plaintiff's discharge became final in November 1989. As of March, 1990 she was still waiting for a decision from the Union on her appeal.

The Collective Bargaining Agreement in effect at the time of this incident allowed reinstatement of a grievance that was improperly withdrawn by the Union upon mutual agreement by the Company and Union or if an agency or court decides that it was improperly withdrawn. The Bargaining Chairman of Local 1196, James Wolske, states that the word "agency" is interpreted by the Company to only include the Equal Employment Opportunity Commission and the Ohio Civil Rights Commission. It does not include any bodies or boards of the Union's internal appeals procedure. The present Collective Bargaining Agreement does not contain this provision. Therefore, exhaustion of internal union remedies could not result in reinstatement of the grievance. So exhaustion was not mandatory and the statute of limitations was not tolled. The Sixth Circuit has held that a Section 301 claim accrues against the company when it accrues against the Union. *Fox v. Parker Hannifin Corporation*, 914 F.2d 795, 803 (6th Cir. 1990).

Accordingly, the UAW's motion for summary judgment is **granted** in its entirety for the same reasons discussed in the Court's Memorandum And Order as to the Company's motion for summary judgment.

IT IS SO ORDERED.

/s/ 12-17-92

George W. White
UNITED STATES DISTRICT JUDGE